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ALEXANDER L. STEVAS,
CLERK

80-1645

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GREGORY DePALMA,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GREGORY DePALMA
Petitioner Pro Se
United States Penitentiary
Danbury, Connecticut

(10835)

QUESTION PRESENTED

Does a misinterpretation of a criminal statute require reversal where a Federal District Court erred when it exceeded its jurisdiction under 28 U.S.C.A. §1826(a), in violation of due process, and the rule of lenity and strict construction?

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IN THE SUPREME COURT OF THE UNITED STATES

GREGORY DePALMA, :

Petitioner, :

-against- :

THE UNITED STATES OF AMERICA, :

Respondent. :

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

Petitioner, Gregory DePalma, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the case of United States v. DePalma, decided on March 5, 1981.

CITATIONS TO OPINIONS BELOW

United States District Judge Stewart, Southern District of New York, denied petitioner's writ of habeas corpus under 28 U.S.C. §2255 (Appendix "A") No. 80 Civ. 4574 (CES) October 16, 1980. An informal opinion of the Court of Appeals entered March 5, 1981 (Appendix "B") No. 80-2284.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254, to review the judgment of the Second Circuit Court of Appeals entered on March 5, 1981.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Due Process Violation -- Amendment V: (See Appendix "C")

2. 28 U.S.C. §1826(a)
(See Appendix "C")

STATEMENT

On the 22nd day of January, 1980, petitioner Gregory DePalma began the service of a 54-month sentence at the Federal Correctional Institution at Danbury, Connecticut. After serving approximately one month of the 54-month sentence, appellant was removed from F.C.I., Danbury, by U.S. Marshalls on an application for a writ of habeas corpus, and returned to the Southern District of New York. Appellant was brought before a grand jury and refused to testify. Subsequently, immunity was granted and appellant was brought before the District Court, Southern District of New York, and ordered to testify. Appellant again refused and was held in contempt. An order was issued staying the

original 54-month sentence and appellant was returned to F.C.I. Danbury to serve the contempt sentence.

On the 21st day of July, 1980, petitioner filed a motion under 28 U.S.C.A. §2255, questioning the conviction obtained by violation of the protection of or against double jeopardy and the District Court's jurisdiction to interrupt the service of his criminal sentence. On the 16th day of October, 1980, the Court issued an order and opinion denying petitioner's 2255 motion.

Petitioner then appealed to the Second Circuit of Appeals. Judge Irving R. Kaufman and Judge William H. Timbers, Circuit Judges, sat with Judge Robert J. Ward, District Judge, sitting by designation. On consideration whereof, it was ordered, adjudged and decreed that the order of said District Court be affirmed.

DePalma now petitions this Court for a Writ of Certiorari so that the Court may redress the grievous Fifth Amendment violation that occurred, and so that the Court may clarify a misinterpretation of a criminal statute whereby a Federal District Court erred when it exceeded its jurisdiction under 28 U.S.C.A. §1826(a), in violation of Due Process, and the rule of lenity and strict construction.

ARGUMENT

WHEN A TRIAL COURT ERRS AND EXCEEDS ITS JURISDICTION UNDER 28 U.S.C.A. §1826(a) IN VIOLATION OF DUE PROCESS, THE RULE OF LENITY AND STRICT CONSTRUCTION, SUCH ERRORS REQUIRE REVERSAL.

Excess of jurisdiction is the state of being outside the limits of jurisdiction. Although the court may have jurisdiction of the subject matter and

the parties, its act or order may, nevertheless, be in excess of its jurisdiction, as being something which it has no power to do; and it has been said that any act of a court in violation of statutory prohibition may be considered to be in excess of jurisdiction.

Jurisdiction must be found in and derived from the law and courts cannot assume jurisdiction which is not conferred on them. Where there is an absence of power conferred by law a court will not act in the premises. Jurisdiction flows from constitutional and statutory provisions and from common law and courts can neither assume jurisdiction which is not conferred on them nor decline that which is conferred. When the attention of the court is called to the absence of a jurisdictional fact, it should refuse to exceed its power.

A court cannot extend its statutory or constitutional powers by judicial fiat and superior courts will rule strictly with regard to matters of jurisdiction of interior courts for the purpose of keeping the latter tribunals strictly within the limits of their jurisdiction.

The acts of a court in excess of its jurisdiction are void. Where a court is without jurisdiction in a particular case, its acts and proceedings can be of no force or validity and are a mere nullity and void even prior to reversal.

The Constitution is the ultimate source of judicial power of courts. Court's jurisdiction is regulated by the Constitution or by statutes enacted pursuant thereto. "Courts created by statute can have no jurisdiction but such as the statute confers." See, Sheldon v. Sill, 1850, 8 How. 441, 49 U.S. 441, 449, 12

L.Ed. 1147. Because the concept of the power of a court to act and affect the rights of a party is so fundamental, jurisdiction of courts to act should be based on clear legislative pronouncements.

The scope of judicial authority should not be lightly extended in the absence of a clear statutory basis. Federal courts should proceed with caution considering the merit of implying statutory innovations. Despite the courts feeling that such innovations might be wise, such a change in statute is more properly a subject of legislative action after "mature consideration" of informed opinion from all relevant quarters with all the opportunities for comprehensive and integrated treatment which such consideration (legislative) affords". See, Miner v. Atlass, 1960, 363 U.S. 641, 80 S. Ct. 1300, 4 L.Ed. 2d 1462.

There is no indication in the Congressional history behind the enactment of 28 U.S.C.A. §1826(a) that would suggest the section addressed anything more than civil contempt as a coercive sanction for recalcitrant witnesses. The unwarranted construction of the statute in the instant case and in recent cases has gained currency by virtue of repetition and merely assumes the existence of such a doctrine based on prior cases which in turn reveal no analysis supporting the conclusion that 28 U.S.C.A. §1826(a) authorizes the interruption of an already being served criminal sentence. Even though the courts may marshall convincing arguments supporting the proposition that Congress "had it considered the problem, would have intended to immunize incarcerated witnesses from coercive sanctions of

1826(a) when all other classes of witnesses are subject thereto". See Martin v. United States, 517 F. 2d 906 (1975). These arguments should be made to the legislature. If, after the due consideration of such arguments and of all competing views, Congress agreed, a section which specifically provides for the interruption of a criminal sentence could be enacted by Congress. Any attempt by the court to enact by their decisions so radical an innovation invades legislative territory and exceeds jurisdiction. "It is simply not for this Court to substitute its accommodation between old and new enhancement provisions for the ones apparently chosen by Congress". Busic v. United States, _____ U.S. _____, 64 L.Ed. 2d 381, 391, 100 S. Ct. _____ (May 19, 1980). On the contrary, "in our Constitutional system the commitment to the separation of

powers is too fundamental for us to pre-empt Congressional action by judicially decreeing what accords with common sense and the public seal". TVA v. Hill, 437 U.S. 153, 195, 57 L.Ed. 2d 117, 98 S. Ct. 2279 (1978).

Within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress. See United States v. Wiltberger, 5 Wheat, 76, 95; United States v. Hudson and Goodwin, 7 Cranch 32, 34. If a federal court exceeds its own authority by imposing punishments not authorized by Congress, it violates the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty. Courts may constitutionally

impose only such punishments as Congress has seen fit to authorize. Congress, in 28 U.S.C.A. §1826(a) does not authorize the interruption of a criminal sentence already being served and because the court has mistakenly held that §1826(a) authorized the interruption of the service of a criminal sentence already being served, said error has deprived appellant of his constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress. Therefore, the judgment of the court must be reversed. This view is consistent with the settled rule that "ambiguity concerning the ambit of a criminal statute should be resolved in favor of lenity". United States v. Bass, 404 U.S. 336, 347. See Simpson v. United States, 435 U.S. 6; Rewis v. United States, 401 U.S. 808; Ladner v. United States, 358

U.S. 169; Bell v. United States, 349 U.S. 81.

As the court said in the Ladner opinion: "This policy of lenity will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." 385 at 178.

Congress has mandated, pursuant to Rule 35 (F.R.A.P.), that after 120 days, even the sentencing court is without the jurisdiction to alter or change in any way, the sentence imposed on a criminal defendant. The sentencing court is the court of Original - Primary - Plenary Jurisdiction. Congress, in an effort to protect criminal defendants from sentencing abuses, has precluded even the court of greatest jurisdiction (the sentencing

court) the right to alter the sentence of a criminal defendant after the expiration of 120 days. How then can it be argued logically that a court in an unrelated matter may interrupt the service of a sentence that not even the court of original jurisdiction can interrupt, in the absence of express legislative authority to do so? There is no presidential authority for the position that a court's jurisdictional power extends beyond the 120-day time limit authorized by Rule 35. The Supreme Court in United States v. Berry, 282 U.S. 304, 306-07 held that action by the sentencing court after the expiration of the time allowed for modification of a final judgment is plainly prohibited.

STRICT CONSTRUCTION

The courts must adhere to the

strict construction of criminal statutes and a strained construction of the language will not be used. United States v. Salen, 235 U.S. 237; Fasulo v. United States, 272 U.S. 620; Prussian v. United States, 282 U.S. 675, 677; McBoyle v. United States, 283 U.S. 25, 27. Innovative interpretations render criminal statutes a nullity, a farce, a mockery and a sham. Either criminal statutes are to be strictly construed or the courts will usurp the power of Congress.

Most recently, in Bifulco v. United States, _____ U.S. _____, 65 L.Ed. 2d 205, 100 S. Ct. _____, No. 79-5010 (June 16, 1980), Chief Justice Burger mandantes that it is the language of the statute that dictates and it is that language that is controlling. What do the words of the statute mean? Of course, we must try to discern the intent of Congress.

But we perform that task by beginning with the ordinary meaning of the language of the statute. Our compass is not to read a statute to reach what we perceive -- or even what we think a reasonable result; Congress must be taken at its word unless we are to assume the role of statute revisors. Aaron v. SEC, No. 79-66, _____ U.S. _____, 64 L.Ed. 2d 611, 100 S. Ct. _____ (June 2, 1980); TVA v. Hill, supra.

Justice Berger further states that "particularly in the administration of criminal justice, a badly drawn statute places strains on judges". See Busic v. United States, supra; LaRocca v. United States, 446 U.S. _____, 64 L.Ed. 2d 381, 100 S. Ct. 1747 (1980). In summation, the Chief Justice eloquently presents the issue at hand and the resolution when he states: "The temptation to exceed our limited judicial role and do what we

regard as the more sensible thing is great, but it takes us on a slippery slope. Our duty, to paraphrase Justice Holmes in a conversation with Judge Learned Hand, is not to do justice but to apply the law and hope that justice is done. I. Dillard, The Spirit of Liberty; Papers and Address of Learned Hand, pp. 306-307 (1960)."

The Chief Justice is mandating that the courts must adhere to the strict construction of the statute and a strained construction of the statute will not be tolerated. See Bifulco, Salen, Fasulo, Prussian and McBoyle, supra.

The innovative interpretation the courts are placing on §1826(a) reeks of Burger's "slippery slope" theory. Their interpretation slides from one side of the slope to the other in the fashion of a down hill racer. In one case the court

refuses to implement the less coercive sanction of daily fines by adhering to a strict interpretation of the statute and argues, the statute does not authorize daily fines, therefore, we do not have the jurisdiction to do so. However, in the very next breath, courts tell us that even though the statute makes no allowance for the interruption of a criminal sentence currently being served, "we think it unlikely that Congress, had it considered the problem, would have intended to immunize incarcerated witnesses from coercive sanctions of Section 1826(a) when all other classes of witnesses are subject thereto". See Martin v. United States, 517 F. 2d 906 (1975). Thus straining the statute to the fullest degree.

The Supreme Court has ruled that civil contempt is not as severe a trans-

gression as one who violates a criminal statute. The contemnee has not violated something prohibited by law; he has refused to obey a decree or order of the court. Therefore, the least possible power adequate to coerce the civil contemnee should be used. See Anderson v. Dunn, 1821 6 Wheat 204, 231. See, also, Taylor v. Hayes, 1974, 418 U.S. 488, 498. Yet in the instant case and in all other cases where a criminal sentence is interrupted to impose a coercive sanction of civil contempt, the courts are ensuing a policy of the greatest possible power adequate to coerce the civil contemnee to testify.

The interruption of the service of a criminal sentence not only exceeds the jurisdiction of §1826(a), it controverts the mandate of the Supreme Court of the United States. Which takes priority,

the more severe transgression of violating something prohibited by a criminal statute or the refusal to recognize an order or decree of the court? The recent rulings would indicate that the courts are of the opinion that the civil contemnee should suffer a more severe punishment than one who violates a criminal statute. The sanction imposed in the instant case caused the service of appellant's criminal sentence to be interrupted. Subsequently, appellant has been deprived of the opportunity to be observed for parole, he earns no good time credit, he is not eligible for a custody reduction to a less secure institution, he is not eligible for rehabilitative programs, furloughs, pre-release programs or a Section 9 award he was recommended for as a result of saving a guard at the institution he is incarcerated at from serious bodily harm. If we were to

exclude for the moment the fact that the appellany is currently serving a civil contempt sanction and assume his criminal sentence was still running and appellant was brought to bar for a capitol offense and convicted for said offense, would the severity of that conviction cause the courts to interrupt the service of a sentence he may then be serving? Of course not. Why? Because there is no statute, not a word or a sentence anywhere in the United States Codes, that authorizes the interruption of the sentence for the violation of a criminal statute that is already being served. There is no statute that gives any court anywhere in the land the jurisdiction to interrupt the service of a criminal sentence and the innovative interpretation the court has given 28 U.S.C.A. §1826(a) is in excess of the jurisdiction bestowed on the courts

through the legislature. Such an excess of its jurisdiction is something which it has no power to do; and any act of a court in violation of a statutory prohibition may be considered to be in excess of jurisdiction. Acts in excess of jurisdiction are void.

CONCLUSION

For all the above reasons, petitioner Gregory DePalma respectfully requests this Court to grant a Writ of Ceriorari to the Second Circuit Court of Appeals.

Respectfully submitted,

March 26, 1981.

Gregory DePalma
United States Penitentiary
Danbury, Connecticut

APPENDIX "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

———————————————————X

GREGORY DePALMA, : 80 Civ. 4574 (CES)

Petitioner, :

-against- : MEMORANDUM DECISION

UNITED STATES OF AMERICA, :

Respondent. :

———————————————————X

STEWART, District Judge:

Petitioner seeks a writ of habeas corpus under 28 U.S.C. §2255. Petitioner claims that a jail sentence imposed by this court for civil contempt that stays the sentence he was already serving for an unrelated offense constitutes double jeopardy within the meaning of the Fifth Amendment.

Contrary to petitioner's contention, the district court has the power to stay a prior federal criminal sentence to

enforce a finding of civil contempt. In re McClanahan, 612 F.2d 643, 644 (2d Cir. 1979); United States v. Dien, 598 F.2d 743, 744 (2d Cir. 1979) (per curiam). Moreover, there is no double jeopardy as the sentence for civil contempt arises from an offense separate and distinct from his prior conviction. See United States v. Dien, 598 F.2d at 745. We therefore find that petitioner's right to due process has not been denied and the writ is denied.

SO ORDERED.

/s/ Charles E. Stewart, Jr.
United States District Judge

Dated: New York, New York
October 16, 1980

APPENDIX "B"

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of March one thousand nine hundred and eighty-one.

Present:

HONORABLE IRVING R. KAUFMAN,

HONORABLE WILLIAM H. TIMBERS,
Circuit Judges,

HONORABLE ROBERT J. WARD,
District Judge, sitting by designation

UNITED STATES OF AMERICA,	)	
Appellee,	)	
v.	)	80-2284
GREGORY J. DePALMA,	)	
Defendant-Appellant.	)	

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

1. The district court had authority under 28 U.S.C. § 1826(a) (1976) to incarcerate appellant for civil contempt because of his refusal to testify before a grand jury after he had received a grant of "use" immunity pursuant to 18 U.S.C. § 6002 (1976). The court also had the power to suspend DePalma's sentence for stock fraud for the duration of his confinement for contempt. See, e.g., United States v. Dien, 598 F.2d 743 (2d Cir. 1979) (per curiam); In re Garmon, 572 F.2d 1373 (9th Cir. 1978). Nothing in Bifulco v. United States, 447 U.S. 381 (1980)

mandates a contrary result. That case merely enunciates the general proposition that when a penal statute is ambiguous, it is to be construed in terms most favorable to the defendant. Bifulco does not require us to give § 1826(a) a cramped interpretation that would frustrate Congress's evident purpose to secure the cooperation of recalcitrant witnesses.

2. The lower court's order does not run afoul of the constitutional prohibition against double jeopardy, for it did not increase DePalma's punishment for stock fraud; it merely delayed the execution of that penalty. See United States v. Liddy, 510 F.2d 669 (D.C. Cir. 1974) (en banc), cert. denied, 420 U.S. 980 (1975). See also United States v. Dien, supra.

/s/ Irving R. Kaufman
IRVING R. KAUFMAN,

FILED
MAR 5 1981
A. Daniel Fusaro,
Clerk
UNITED STATES
COURT OF APPEALS
SECOND CIRCUIT

/s/ William H. Timbers
WILLIAM H. TIMBERS,
Circuit Judges,

/s/ Robert J. Ward
ROBERT J. WARD,
District Judge.

APPENDIX "C"

AMENDMENT V - CAPITOL CRIMES; DOUBLE JEOPARDY, SELF INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY.

No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. § 1826(a)
RECALCITRANT WITNESS

Whenever a witness in any proceeding before an ancillary to any Court or Grand Jury of the United States refuses without just cause shown to comply with an order of the Court to testify or provide other information, including any book, paper, document, record, recording or other material, the Court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of -

(1) The Court proceedings, or

(2) The term of the Grand Jury, including extensions before which such refusal to comply with the Court order occurred, but

in no event shall such confinement exceed eighteen months.